UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH W. MARTIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 97-179-P-H***
	)	
BEAGLE ENTERPRISES LIMITED PARTNERSHIP, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS OR TRANSFER

This diversity-based case presents allegations of violation of the Jones Act, 46 U.S.C. App. § 688 *et seq.*, and general maritime law arising out of injuries suffered by the plaintiff while aboard a vessel, the F/V Beagle, allegedly owned and operated by the defendants, Beagle Enterprises Limited Partnership and Iquique US, Inc. The defendants have moved pursuant to Fed. R. Civ. P. 12(b)(2) to dismiss the complaint for lack of *in personam* jurisdiction and to transfer the proceeding to the Western District of Washington. I recommend that the case be transferred.

I. Applicable Law

A. Personal Jurisdiction

The Jones Act appears on its face to limit jurisdiction: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal

office is located." 46 U.S.C. App. § 688(a). However, the Supreme Court has held that this language actually only "prescribe[s] the venue for actions brought under the [Jones] act." *Panama R. Co. v. Johnson*, 264 U.S. 375, 385 (1924). The provision "merely confers on the defendant a personal privilege, which he may assert, or may waive, at his election." *Id.* Here, the defendants have not objected to venue in this court,[1] and, therefore, the jurisdiction of this court over the Jones Act claim will be considered in concert with its jurisdiction over the claims asserted under general maritime law.

Personal jurisdiction over the defendants on the plaintiff's claims must comply with the due process requirements of the Fifth Amendment. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (3d Cir. 1981). "Generally, due process requires that the defendant have 'minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Archibald v. Archibald*, 826 F. Supp. 26, 29 (D. Me. 1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (brackets in original).

The due process inquiry requires the court to determine whether the claim or cause of action arises out of, or is related to, the defendants' contacts with Maine and whether the defendants purposefully directed their activities at residents of Maine. *Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1207 (D. Me. 1990). The plaintiff carries the burden of proof at this first stage of inquiry, which he may meet with a *prima facie* showing supported by the pleadings, affidavits and any exhibits. *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 979 (1st Cir. 1986). Even if the

[1] However, the defendants have moved in the alternative to transfer this action to the Western District of Washington pursuant to 28 U.S.C. § 1404(a), a statute entitled "Change of venue," and the Jones Act's stated preference for venue in the district in which the defendant employer has its principal office is a factor to be considered in evaluating whether to transfer this action if it would otherwise have to be dismissed. *See* Section III B, *infra*.

plaintiff has not demonstrated that the acts at issue in the litigation were sufficiently directed at the forum, jurisdiction may still lie in this court if the defendants have had other contacts with the forum that are "continuous and substantial." *Talus Corp. v. Browne*, 775 F. Supp. 23, 26 (D. Me. 1991) (citation omitted). The defendants may defeat an otherwise valid assertion of jurisdiction by demonstrating that their contacts with the forum are so minimal that submitting to suit in the forum would not comport with notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

II. Factual Background

The record, including the affidavits of the parties, with attached exhibits, establishes the following facts. The plaintiff is a resident of Maine. Affidavit [of Joseph W. Martin] ("Plaintiff's Aff."), attached to Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Plaintiff's Opposition") (Docket No. 9), ¶ 1. On February 15, 1995 the plaintiff was injured while a member of the crew of the F/V Beagle, Complaint ¶¶ 7-8, a fishing vessel owned by defendant Beagle Enterprises Limited Partnership ("BELP"), a Washington limited partnership, Affidavit of Michael J. Hyde (Docket No. 6), ¶¶ 2, 4. The F/V Beagle operates from the port of Seattle, Washington and has never visited the state of Maine or done any business in any Maine port. *Id*. ¶¶ 5-6. BELP does not maintain any bank accounts or own any property in the state of Maine, nor does it conduct any business, advertise or solicit business in Maine. *Id.* ¶ 3 No BELP employees have traveled to Maine for business purposes. *Id.* The F/V Beagle has never hired crew in Maine. *Id.* ¶ 6.

Defendant Iquique US, LLC ("Iquique"), a Washington corporation with offices in Seattle, does not maintain any bank accounts or own any property in the state of Maine. Affidavit of Michael

L. Zubko (Docket No. 5) ¶¶ 2-3. It does not conduct any business or advertise in Maine. *Id.* ¶ 3.

In February or early March 1995 the plaintiff, while in Maine, received a telephone call from a man whom he had known for years who said that he was calling from the F/V Beagle. Plaintiff's Aff. ¶ 2. This man wanted to know if the plaintiff was interested in the engineer's job on the F/V Beagle. *Id.* ¶ 3. The plaintiff indicated that he was interested. *Id.* A day or so later, the plaintiff, still in Maine, received a telephone call from another man, whom he had also known for years, who identified himself as one of the owners of the F/V Beagle and offered him the job. *Id.* ¶¶ 4-5. This man offered the plaintiff payment of $1,000 per week plus a share, beginning the day the plaintiff left Portland, Maine,[2] and payment for his travel expenses back to Maine at the end of the period of employment. *Id.* ¶ 5. The plaintiff took the job. *Id.*

Before leaving Maine, the plaintiff received one more call from the man who had offered him the job and an unspecified number of calls from "Jackie Little of Iquique." *Id.* ¶ 8. The plaintiff bought his own ticket to Seattle, where he met with Jackie Little and signed an employment contract. *Id.* ¶¶ 8-9. The plaintiff signed the contract without reading it and did not receive a copy. *Id.* ¶¶ 10, 12. The plaintiff then flew from Seattle to Kodiak, Alaska to join the ship, on a ticket provided by the defendants. *Id.* ¶ 8. After he was injured, the plaintiff returned to Maine at the defendants' expense. *Id.* ¶ 13. Other residents of Maine work on the F/V Beagle or "another boat owned by defendants." *Id.* ¶ 14. The employment contract is between the plaintiff and BELP. *Id.* Exh. A at 1.

[2] The defendants dispute this statement, noting that the employment contract, Exh. A to Plaintiff's Aff., provides that payment would begin on March 2, 1995, "the date of the boarding of the vessel in Alaska." Reply Memorandum in Support of Defendants' Motion to Dismiss or Transfer (Docket No. 11) at 2.

III. Analysis

A. Personal Jurisdiction

The defendants contend that personal jurisdiction is lacking because they have no contacts with the state of Maine. The plaintiff counters that he has made the requisite *prima facie* showing for specific[3] personal jurisdiction because he is a resident of Maine, and because the defendants have had contacts with the state of Maine that "are bound up with the very cause of action" that he asserts. Plaintiff's Opposition at 2. As evidence of the necessary minimum contacts, the plaintiff asserts that the defendants contacted him by telephone "at least twice" while he was in Maine, and that during one of these conversations the terms of the employment contract between the plaintiff and BELP were negotiated; the defendants paid the cost of his return travel to Maine from the F/V Beagle; BELP undertook to pay the plaintiff's salary beginning the day he left Maine; and the defendants hired the plaintiff and other employees in Maine. *Id*. at 2-3. The plaintiff relies on *Merrill v. Zapata Gulf Maine Corp*., 667 F. Supp. 37, 40 (D. Me. 1987), and *Ganis Corp. of California v. Jackson*, 822 F.2d 194, 197 (1st Cir. 1987).

Ganis, a case involving execution on a default judgment on a contract claim, 822 F.2d at 195, provides little assistance. The page of the *Ganis* opinion cited by the plaintiff merely recites the legal standard for "minimum contacts" analysis: whether "the defendant's conduct and connection

[3] A defendant's activities within Maine may also create general jurisdiction over that defendant in the courts of this district "when a defendant's activities within the state are 'substantial' or 'continuous and systematic.'" *Archibald*, 826 F. Supp. at 29 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). The evidence of the defendants' activities in Maine offered by the plaintiff do not begin to rise to the level of substantial or continuous activity. If the plaintiff is to carry his burden to show personal jurisdiction at all, he will be able to show only specific jurisdiction — that his claims arise out of or are sufficiently related to the defendants' activities in Maine. *Smirz*, 732 F. Supp. at 1207.

with the forum State are such that he should reasonably anticipate being haled into court there," *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 297 (1980), and whether the plaintiff has identified "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *Ganis*, 822 F.2d at 197. The *Ganis* court's subsequent discussion of the "contract-plus" analysis of personal jurisdiction, 822 F.2d at 197-98, is irrelevant to the instant case, which is based in tort, not contract claims.

The plaintiff makes no showing that the payment of his salary or the payment for his travel expenses occurred in Maine. His remaining allegations, consisting of "at least" two telephone calls initiated by the defendants and the hiring of an unspecified number of Maine residents, are simply insufficient to establish personal jurisdiction. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206-07 (1st Cir. 1994) (discussing relatedness and causation requirements for due process inquiry for exercise of personal jurisdiction in tort case).

Merrill involved an allegation of breach of an employment contract. This court also applied the "contract-plus" analysis in *Merrill*. 667 F. Supp. at 40. The court's analysis relied on *Ganis*. As such, *Merrill* is distinguishable from the instant case. Here, the basis of the claim is not the contractual relationship between the parties. The First Circuit describes the kinds of contacts enabling specific jurisdiction as those bearing "a direct relation to" the underlying cause of action. *Sandstrom v. Chemlawn Corp*., 904 F.2d 83, 88 (1st Cir. 1990). An action arising from forum contacts would directly stem from the defendant's activities within the forum. In this case, the fact that the injury, which occurred at sea or in Washington or Alaska, would not have occurred but for the offer of employment made by telephone call into Maine is not determinative. The defendants'

alleged negligence, and their alleged failure to provide a seaworthy vessel or maintenance and cure, did not arise out of their telephone calls to the plaintiff. *See Rivera v. Pocahontas Steamship Co*., 340 F. Supp. 1307, 1311 (D. Mass. 1971) (dismissing action for personal injuries incurred in vessel on high seas when plaintiff failed to show that defendant's business in Massachusetts at time of injury related to its operation of the vessel or that the cause of action resulted from anything that the defendant did or ought to have done in Massachusetts).

B. Transfer

The absence of personal jurisdiction is no impediment to transfer of an action to another district. 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3827 (2d ed. 1986) at 262-64. This is true whether venue in the initial court is improper, in which case 28 U.S.C. § 1406(a)[4] is invoked as authority for the transfer, or venue in the initial court is proper, in which case 28 U.S.C. § 1404(a)[5] is invoked, as the defendants have done here. "The end result is the same." *Id*. at 265. "The usual procedure should be transfer rather than dismissal." *Id.* at 274. *See also Coté v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986) (court transferring action under § 1404(a) need not have personal jurisdiction over defendants); *Naegler v. Nissan Motor Co.*,835 F. Supp. 1152, 1156 (W. D. Mo. 1993) (same); *cf. Carteret Sav. Bank , FA v. Shushan*, 919 F.2d 225, 231 (3d Cir. 1990) (transfer where venue is proper but no personal jurisdiction exists may not be made where plaintiff

[4] 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[5] 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district of division where it might have been brought."

objects).

Here, the plaintiff's objection to transfer is perfunctory at best. His argument addresses only the possibility of dismissal on the basis of the doctrine of *forum non conveniens*, Plaintiff's Opposition at 7-9, an approach advocated by the defendants which I do not reach.[6] Where, as here, the alternative to transfer is dismissal of the action, I find that it is in the interest of justice that the matter be transferred to the Western District of Washington, where this action might have been brought.[7] 28 U.S.C. § 1631. The fact that pursuing this matter in that forum will undeniably impose some greater burdens on the plaintiff is irrelevant in the face of this court's lack of personal jurisdiction over the defendants. In order to effectuate the transfer, it is necessary to deny the motion to dismiss, even though personal jurisdiction does not exist in this court.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **DENIED**, that their motion for transfer of venue be **GRANTED**, and that this matter be transferred to the United States District Court for the Western District of Washington.

NOTICE

[6] Case law construing 28 U.S.C. §§ 1404 and 1406 suggests that the doctrine of *forum non conveniens* has been superseded by the statutes, *e.g.*, *Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 (5th Cir. 1983), or at least should not be invoked in cases in which either of the statutes is applicable, *e.g.*, *Yerostathis v. A. Luisi, Ltd.*, 380 F.2d 377, 379 (9th Cir. 1967).

[7] This result and the finding that this court does not have personal jurisdiction over the defendants make it unnecessary to consider the defendants' alternate argument based on a choice of forum clause in the employment contract signed by the plaintiff.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of November, 1997.

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David M. Cohen
United States Magistrate Judge